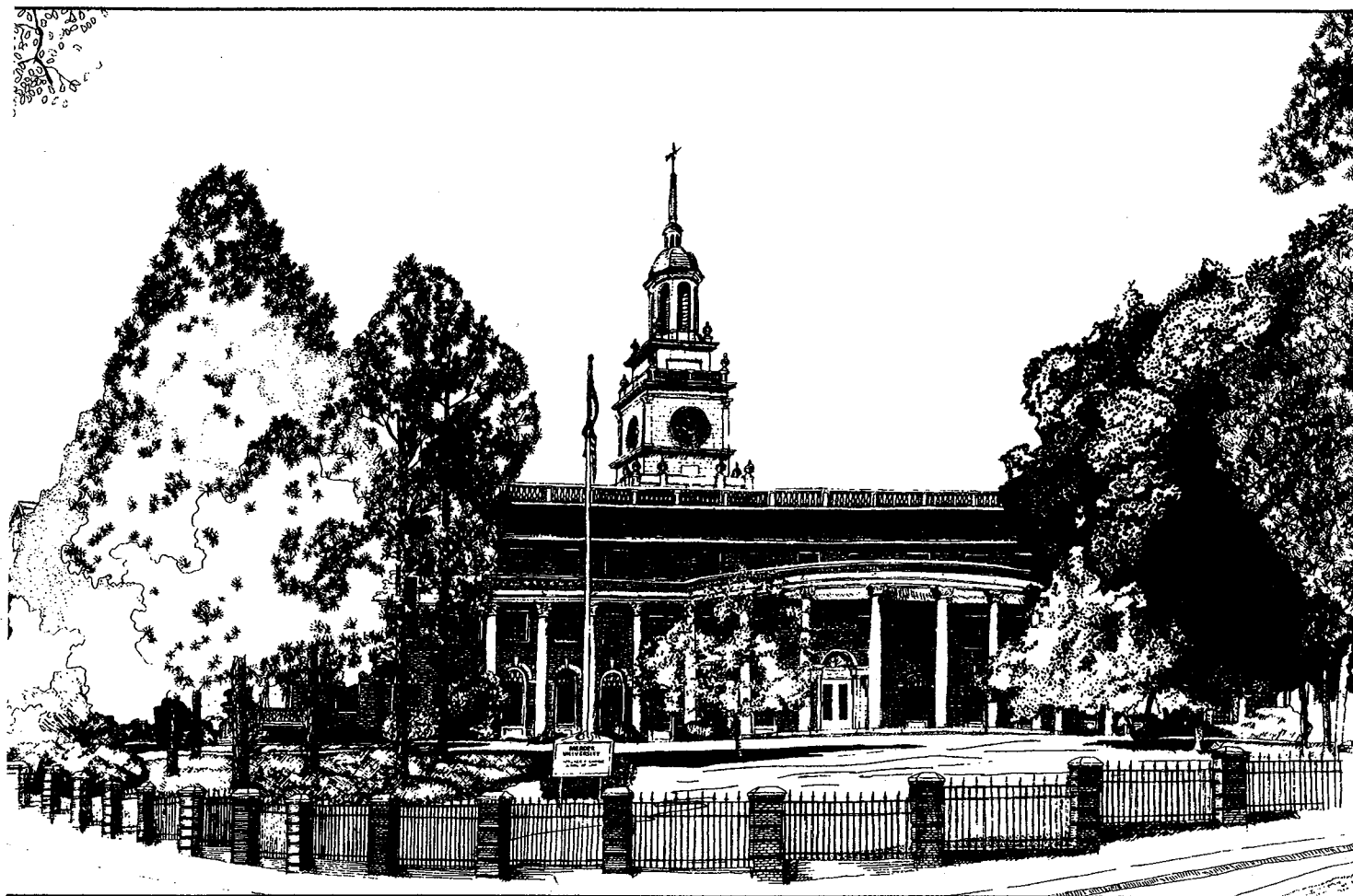

MERCER LAW REVIEW

Walter F. George School of Law



Screen-Scraping and Harmful Cybertrespass After *Intel*

George H. Fibbe

MERCER LAW REVIEW

Member of the National Conference of Law Reviews, Inc.

Volume 55

Spring 2004

Number 3

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Screen-Scraping and Harmful Cybertrespass After *Intel*

by George H. Fibbe*

I. INTRODUCTION

The topic for this Symposium, “The Internet: Place, Property, or Thing—All or None of the Above,” touches on a debate that has existed since the early days of the Internet. There is no question that people commonly understand their experience using the Internet with the help of spatial metaphor—e.g., “sites” and “addresses” that we “visit,” and programs called “robots,” “crawlers,” and “spiders.” Leaving metaphor aside, many of the constituent parts of the Internet, especially computer servers, are items of private personal property.

Indeed, the debate over metaphor is reminiscent of the scene from the movie *Field of Dreams*¹ in which Shoeless Joe Jackson looks out over the magical baseball field and asks, “Is this heaven?”² The response is, “No, it’s Iowa.”³ Similarly, whether we consider our interaction with the Internet broadly—“Is this cyberspace?”—or more narrowly—“No, it’s just a group of computers”—is a particularly timely topic for courts deciding disputes over “screen-scraping.”

Many writers have criticized the “cyberspace-as-place” metaphor and its effect on judicial reasoning. Essentially, critics contend that the cyberspace-as-place metaphor has driven courts down the wrong path. These writers often object to courts’ use of this metaphor because of the

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I would like to thank Paul Yetter and Professor David Hricik for their input and assistance with this Article. I would also like to thank the Mercer Law Review for inviting me to speak at this Symposium.

1. *FIELD OF DREAMS* (Universal Studios 1989).
2. *Id.*
3. *Id.*

public policy implications of strong property rights on the Internet. This is especially true of screen-scraping cases applying traditional trespass doctrine to the Internet.

It is unlikely, though, that courts are blindly riding the cyberspace-as-place metaphor to reach results dramatically different from those they would otherwise reach. Enough room exists in the still-unsettled trespass doctrine and in available analogies for courts to reach differing results. Indeed, courts both enjoining cybertrespasses and refusing to enjoin them have openly resisted certain metaphors. Thus, judicial decisions may be driven more by a mundane balancing of interests than by confusion regarding the appropriate cyberspace metaphor. Specifically, courts are more likely to favor property owners when trespassers cause substantial commercial harm, which is common in screen-scraping cases.

The California Supreme Court's recent decision in *Intel Corp. v. Hamidi*⁴ may be an example of this balancing. In *Intel* the court acted against a general willingness among courts to apply the doctrine of trespass to cyberspace misbehavior.⁵ The majority even criticized the dissent's use of various spatial analogies,⁶ and some may contend that the court in *Intel* simply avoided confusing metaphors. In terms of the interests of the litigants that were at stake, however, *Intel* was different from most cybertrespass cases because it was not a purely commercial dispute. *Intel* lacked evidence of a threat of serious commercial harm that generally weighs in favor of owner protection, and it concerned somewhat unique, individual free-speech claims.⁷

Because of its noncommercial setting, *Intel* does not signal a reversal of courts' willingness to enjoin cyberspace trespasses by screen-scrapers. At the least, *Intel* is a poor vehicle for assessing the interests of website owners against commercially harmful scrapers.

II. WHAT COURTS HAVE DONE

The path courts have taken in applying trespass-to-chattels to protect website owners from screen-scraping has been well noted but is worth a brief review.

Screen-scraping, also called data aggregation or indexing, encompasses technologies variously referred to as robots, spiders, crawlers, or

4. 71 P.3d 296 (Cal. 2003).

5. *Id.* This willingness to enjoin applies not only to screen-scraping, but also to unsolicited commercial e-mail, or "spam." See, e.g., *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

6. *Intel*, 71 P.3d at 310 n.7.

7. *Id.* at 303-12.

automated devices. Disputes over screen-scraping tend to be between business actors and involve unauthorized access to websites for profit, all to the commercial detriment of the website owner.⁸ Like cases involving spam, screen-scraping disputes commonly include efforts by website owners to block the unauthorized access, as well as scrapers' evasion of such protections.

The first court to apply trespass-to-chattels to computer misbehavior was a California court in the 1996 case of *Thrifty-Tel, Inc. v. Bezenek*,⁹ which concerned teenagers hacking into a telephone company's computer system. In the process, the teenagers were trying to find authorization codes that would allow them to make free long-distance phone calls. The teens managed to overburden the system and denied some phone customers service. The trial court found the teens liable for conversion.¹⁰ The appellate court affirmed but avoided the question of whether intangible computer access codes could be the subject of conversion by holding that the judgment was correct as a trespass-to-chattels claim.¹¹

After *Thrifty-Tel*, Internet service providers brought a series of cases against senders of unsolicited commercial e-mail, commonly known as spam.¹² The most influential of these cases was *CompuServe, Inc. v. Cyber Promotions, Inc.*¹³ In this 1997 case, the court found that Cyber Promotions's spam used up CompuServe's storage capacity and processing power, thus diminishing the value to the company of its computer systems.¹⁴ Also, CompuServe was losing customers because

8. One eBay witness referred to such software robots that do not respect website owners' requests to stop scraping the website as "rude robots." See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1066 n.14 (N.D. Cal. 2000).

9. 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).

10. *Id.* at 471-72.

11. *Id.* at 472. The court in *Thrifty-Tel* also found that the teenagers' conduct constituted fraud because their actions misrepresented to the phone company's computer system (its agent) that they were authorized users, a representation on which the computer relied in granting access. *Id.* at 473-74. Other litigants and courts do not appear to have pursued this theory to combat scraping, but it seems to be a relevant inquiry when scrapers evade website owners' screening efforts by intentionally representing that they are not unauthorized users.

12. See, e.g., *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998); *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D. Va. 1998); *Hotmail Corp. v. Van\$ Money Pie Inc.*, 47 U.S.P.Q. 2d 1020 (N.D. Cal. 1998); *Am. Online, Inc. v. Nat'l Health Care Disc., Inc.*, 121 F. Supp. 2d 1255 (N.D. Iowa 2000).

13. 962 F. Supp. 1015 (S.D. Ohio 1997).

14. *Id.* at 1022.

of spam, and the court found that CompuServe's lost goodwill was actionable under the trespass-to-chattels theory as well.¹⁵

Interestingly, CompuServe tried to block Cyber Promotions's spam, but the company managed to evade the blocking efforts by disguising the identity of the sender.¹⁶ This "masking" or "aliasing" of one's Internet address is a common practice of spammers and screen-scrapers alike and turns up in almost all of the major cases on the subject.¹⁷

One early and important screen-scraping case was *EF Cultural Travel BV v. Explorica, Inc.*,¹⁸ decided in 2001. Former employees of EF Cultural Travel BV ("EF"), a tour company, started a competing venture. The new company, Explorica, hired software firm Zefer to develop a screen-scraping tool, which Explorica used to compile EF's tour prices from its website. Explorica then undercut EF's prices. EF obtained a preliminary injunction against the scraping under the federal Computer Fraud and Abuse Act.¹⁹ The court of appeals upheld the injunction because Explorica developed the scraper tool with EF information that was covered by a confidentiality agreement signed by a former EF employee.²⁰ Thus, the scraping was without authorization and was prohibited.²¹

The first major application of trespass theory to screen-scraping was Judge Whyte's now-famous opinion in *eBay, Inc. v. Bidder's Edge, Inc.*²² That dispute arose after the well-known auction website could not come to licensing terms with Bidder's Edge ("BE"), an auction "aggregator" that wanted to list eBay auction items on its own website. When eBay's technological efforts to block BE's access to its site were unsuccessful,

15. *Id.* at 1023.

16. *Id.* at 1017.

17. *See Intel*, 71 P.3d at 301; *see also* Steve Fischer, *When Animals Attack: Spiders and Internet Trespass*, 2 MINN. INTELL. PROP. REV. 139, 156 n.121 (2001) (noting that "proxy servers" can be used to mask IP addresses and avoid efforts by website owners to block access to the sites); Maureen A. O'Rourke, *Shaping Competition on the Internet: Who Owns Product and Pricing Information?*, 53 VAND. L. REV. 1965, 1984-85 (2000).

18. 274 F.3d 577 (1st Cir. 2001).

19. *Id.* at 579-80 (citing 18 U.S.C. § 1030(a) (2000)).

20. *Id.* at 582-85. The First Circuit later upheld the injunction against the software designer, Zefer. *See EF Cultural Travel BV v. Zefer Corp.*, 318 F. 58, 64 (1st Cir. 2003).

21. 274 F.3d at 583.

22. 100 F. Supp. 2d 1058 (N.D. Cal. 2000). Professor Mark Lemley has placed Internet trespass cases in two categories—attempts to acquire information, and attempts to convey information. *See* Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 540 (2003). Note that attempts to acquire information on the Internet involve a prerequisite sending of an electronic request for the information to the server on which it resides. Thus, in screen-scraping cases, a trespass precedes a variety of other injuries that scrapers potentially may commit.

BE's software robots accounted for approximately 1.5 percent of the traffic on eBay's site.²³ The court recognized the reputational harm eBay might suffer due to BE's scraping, especially when BE may not have been displaying accurate or up-to-date information.²⁴ More central to the court's ruling was its recognition that eBay had a valuable property interest in its server capacity, and that the use of that capacity by BE deprived eBay of the use of some amount of that capacity.²⁵ Based on BE's scraping and the threat posed by BE's potential competitors accessing eBay's website, the court issued a preliminary injunction.²⁶

Shortly after *eBay*, a different federal court in California refused to grant a preliminary injunction against a company engaging in screen-scraping in *Ticketmaster Corp. v. Tickets.com, Inc.*²⁷ Tickets.com used a spider to scrape event information from Ticketmaster's site so that Tickets.com users could be routed directly to individual Ticketmaster event pages if Tickets.com could not offer tickets for the event.²⁸ In *Ticketmaster* the court focused more on the information at issue and seemed less concerned about how Tickets.com accessed that information.²⁹ Because Ticketmaster failed to produce any evidence of harm or potential harm to its computer system, the court declined to issue an injunction.³⁰ No evidence was before the court that Tickets.com's use interfered with Ticketmaster's regular business, and, unlike in *eBay*, there was no specter of "dozens or more parasites joining the fray."³¹ Also, the court did not recognize a substantial commercial harm caused by Tickets.com's activity where ticket buyers were sent to Ticketmaster's site to make their purchases.³²

Six months after *eBay*, a federal court in New York decided *Register.com, Inc. v. Verio, Inc.*³³ Register.com allowed users to register Internet domain names. As part of its business, it sent to registrants

23. *eBay*, 100 F. Supp. 2d at 1063.

24. *Id.* at 1064.

25. *Id.* at 1071.

26. *Id.* at 1073.

27. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99CV7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000). The court had previously issued a minute order on the preliminary injunction motion, stating that it intended only to announce a result, and not to make any "pronouncements of legal significance." *Id.* at *1.

28. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003), at *1-2 (slip copy).

29. *See id.* at *3-5.

30. *Id.* at *3.

31. 2000 WL 1887522, at *4.

32. *Id.*

33. 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

commercial marketing communications if they chose to receive them. Register.com also sold its list of recent registrants to other businesses on a weekly basis but put restrictions on how buyers of the lists could solicit the registrants' business. In a plan it called "Project Henhouse," Verio scraped registrants' contact information from Register.com's website so it could solicit them for Verio's website support services. Verio's business strategy included both screen-scraping and sending spam.³⁴

Verio admitted its scraping used some portion of Register.com's computer capacity, and the court noted that there was evidence that without an injunction, Verio's competitors would join in the scraping.³⁵ In enjoining Verio, the court found that part of Register.com's irreparable harm included "lost opportunities to sell competing services to its opt-in customers,"³⁶ and loss of "reputation and goodwill with customers and co-brand partners."³⁷

In late 2001, in *Oyster Software, Inc. v. Forms Processing, Inc.*,³⁸ defendant, Forms Processing, Inc. ("FPI"), copied Oyster's "metatags" such that search engines would show a description of Oyster's products and services but would then divert the searcher to FPI's website.³⁹ Relying on *eBay*, the court found that Oyster stated a claim for trespass even though no evidence existed that FPI's actions were causing its computer servers to malfunction.⁴⁰

In March 2003, the court in the on-going *Ticketmaster* case⁴¹ remained unconvinced and thus eliminated Ticketmaster's trespass claim altogether.⁴² The court believed that Ticketmaster suffered no serious commercial harm, and it never embraced the trespass theory.⁴³ At some point during the litigation, Tickets.com stopped its deep-linking and sent users to Ticketmaster's homepage. It also stopped using a spider or crawler to access the Ticketmaster website.⁴⁴ The court found, again, that there was no evidence of damage to Ticketmaster's

34. *Id.* at 241-42.

35. *Id.* at 250-51.

36. *Id.* at 248.

37. *Id.* The Second Circuit upheld the preliminary injunction against Verio based on breach of the Register.com website use agreement, trespass-to-chattels, and the Lanham Act. See *Register.com, Inc. v. Verio, Inc.*, 2004 WL 103400 (2d Cir. Jan. 23, 2004).

38. No. C-00-0724JCS, 2001 WL 1736382 (N.D. Cal. Dec. 6, 2001).

39. *Id.* at *1-2.

40. *Id.* at *13.

41. *Ticketmaster Corp.*, 2003 WL 21406289.

42. *Id.* at *3.

43. *Id.*

44. *Id.* at *1-2.

computer system, no trespass-to-chattels, and the value of the information taken and efforts to block Tickets.com's spider were not relevant.⁴⁵

The very next day, in a case carefully watched in the travel industry, a Texas court in *American Airlines, Inc. v. FareChase, Inc.*⁴⁶ enjoined a scraper from accessing American Airlines's AA.com website.⁴⁷ FareChase's software scraped American's webfares from the site and allowed them to be distributed by traditional travel agents, who ordinarily could not offer them. FareChase's scraping undermined American's program designed to lower its \$400 million annual distribution costs.⁴⁸ The court found that FareChase's scraping caused various types of harm to American and its computer system; it occupied American's computer capacity; and, like the *eBay* case, there was the threat that without an injunction other scrapers would add to the burden on American's website infrastructure.⁴⁹ Thus, the court issued an injunction based, in part, on trespass-to-chattels.⁵⁰

III. WHAT COMMENTATORS HAVE SAID

The academic literature on those decisions, and particularly on *eBay*, has been surprisingly negative. Although at least one scholar has argued for the application of strict trespass-to-land rules to cyberspace disputes,⁵¹ most have argued the opposite. Criticism of the trespass-to-chattels theory includes suggestions that: (1) it is simply too old to have any relevance to cyberspace; (2) it fails to grasp the technical nuances of the Internet; and (3) it is too heavy-handed and does not allow for

45. *Id.* at *3.

46. No. 067-194022-02 (67th Dist. Ct., Tarrant County, Texas, Mar. 8, 2003) (order granting temporary injunction), available at http://www.eff.org/Cases/AA_v_FareChase/20030310_prelim_inj.pdf. The Author was part of the team representing American Airlines in obtaining the injunction.

47. *Id.* at *4-5.

48. *Id.* at *2-3.

49. *Id.* at *2-4.

50. *Id.* at *2. The court based its injunction on FareChase's trespass to chattels and breach of the AA.com User Agreement, and it stated that FareChase's conduct may have been a violation of the Texas Computer Crime statute. *Id.* (citing TEX. PENAL CODE ANN. §§ 33.02 (2004)).

51. See Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 82-84 (2003). Epstein stated:

To think of a fixed internet site, or the equipment that supports it, as though it were a chattel or personal property is to miss the operative distinction of the earlier law, where "movables" was often used as a synonym for personal property and "immovables" as a synonym for real property. The blunt truth is that an internet site is fixed in its cyberspace location

Id. at 83.

balancing of interests, particularly the public interest in the free flow of information. Also, some writers criticized *eBay's* understanding of the "harm" required to sustain a trespass-to-chattels claim, and contend there is little danger that screen-scrapers will crash websites.⁵²

Most of the criticisms of the screen-scraping decisions focus on broad public policy concerns. Some commentators argue that property owners' rights to exclude screen-scrapers or other trespassers will stifle the free flow of information that defines the Internet.⁵³ This so-called "cyber-space enclosure movement"⁵⁴ would prevent the emergence of new comparison shopping tools and would create a digital "anticommons," where ordinary Internet users would be trespassers, and the Internet would atrophy into a virtual wasteland.⁵⁵

Also, some scholars express an underlying sense of injustice that commercial actors seek to enforce antiquated notions of private property in a heretofore "public" space—that is, businesses have taken advantage of a vast public infrastructure without dedicating their property to the public digital commons.⁵⁶ Businesses might correctly counter that they did not sign up to make a public donation when they invested millions in their computer servers.

A few scholars, however, have supported the trespass theory. Arguments in favor of trespass typically suggest that clear rights to protect against unwanted access to computer property will help to produce efficient outcomes.⁵⁷ In contrast, allowing trespass to go without a private remedy would subject property owners to the

52. Brief of Amici Curiae in Support of Bidder's Edge, Inc., Appellant, Supporting Reversal at 15, *Bidder's Edge, Inc. v. eBay Inc.* (9th Cir. 2000) (No. 00-15995) (arguing that because aggregators depend on information from target websites, they have incentives to prevent those sites from crashing). There would likely be a collective action problem for scrapers attempting to coordinate their activities.

53. See, e.g., Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 527 n.24 (2003) (listing articles criticizing applications of trespass); Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000). Brief of Amici Curiae in Support of Bidder's Edge, Inc., Appellant, Supporting Reversal at 19, *Bidder's Edge, Inc. v. eBay, Inc.* (9th Cir. 2000) (No. 00-15995) (stating that the decision in *eBay* "threatens the very foundations of the Web").

54. See, e.g., Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 502 (2003).

55. *Id.* at 508 ("We can say goodbye to new types of search engines that affect—in any way—the business models of the sites that they index."); see also Brief of Amici Curiae in Support of Bidder's Edge, Inc., Appellant, Supporting Reversal, *Bidder's Edge, Inc. v. eBay, Inc.* (9th Cir. 2000) (No. 00-15995) (contending that the ability of website owners to exclude scrapers encourages anticompetitive conduct).

56. See Hunter, *supra* note 54, at 502.

57. See Epstein, *supra* note 51, at 74; see also David McGowan, *Website Access: The Case for Consent*, 35 LOY. U. CHI. L.J. 341 (2003).

untenable position of having to bargain with an infinite number of potential trespassers for the right to exclude.⁵⁸ Thus, just as the court in *eBay* reasoned,⁵⁹ allowing screen-scraping could lead to a death by a thousand cuts in which the websites are subject to access by as many unwanted and unauthorized scrapers as choose to target them. Even the most robust websites would have difficulty anticipating and handling the levels and patterns of use of their systems.

Note that a rule stating that website owners cannot protect their property from screen-scrapers except when their computer systems are on the brink of failure could be problematic. It would be difficult for website owners to know when and against whom to bring suit and, as a practical matter, e-commerce businesses would likely be forced to invest in greater capacity to avoid suffering a system failure. Thus, website owners would be forced to subsidize trespassers. Further, such a rule would effectively give poorly-architected websites greater protection than well-architected sites.

In response to predictions that the protection of property rights in Internet-related chattels will lead to a wasteful anti-commons, an amicus curiae brief in *Intel* argued that such predictions simply bear no relationship to reality.⁶⁰ Website owners will no more bar large numbers of Internet users from their property than shopkeepers would ask large numbers of customers to leave the premises. But if a shopkeeper asks a patron to leave the premises, such a request should be honored.

Also, one commentator suggested that the trespass theory is capable of balancing competing interests in Internet disputes.⁶¹ Indeed, as discussed in Section IV, courts have been carefully balancing interests. The underlying point of the critics is that they simply disagree with the usual outcome of that balancing, namely the protection of the private property rights of website owners against trespassers.

IV. *INTEL CORP. V. HAMIDI*

Despite the academic criticisms, the trend among courts in enjoining website trespasses by screen-scrapers has been steady. Last summer,

58. See Epstein, *supra* note 51, at 74.

59. 100 F. Supp. 2d at 1066.

60. See Amicus Brief of California Employment Law Council, et al. at 35-37, *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003) (No. S103781); see also McGowan, *supra* note 57, at 371-72.

61. See Richard Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 VILL. L. REV. 117, 119 (2002).

however, in *Intel Corp. v. Hamidi*,⁶² the California Supreme Court in a 4-3 decision re-evaluated California law on trespass-to-chattels and overturned an injunction issued on that basis.⁶³ The case concerned a former Intel employee who aired his grievances with the company by sending mass e-mails to internal Intel addresses criticizing the company's employment policies. After he refused to stop sending the messages, and after Intel was unable to block the messages, the company sued and won a preliminary injunction based on trespass-to-chattels. An appellate court upheld the injunction.⁶⁴

Subsequently, the state supreme court granted review.⁶⁵ The supreme court exhaustively reviewed treatises and textbooks on tort law, and the majority decided that Intel should not be granted an injunction to prevent Hamidi from sending messages.⁶⁶ The majority suggested that Hamidi may have committed a technical trespass,⁶⁷ but without any evidence that the e-mails threatened the integrity of Intel's computer system, the company was limited to self-help as a remedy.⁶⁸ Based on its ruling with respect to the trespass claim, the majority did not address whether there was state action sufficient to support Hamidi's claim that an injunction would violate his First Amendment rights.⁶⁹

Two Justices vehemently dissented. One dissenter suggested that the majority harbored "antipathy toward property rights," and "contempt for grubby commerce and reverence for the rarified heights of intellectual discourse."⁷⁰ The dissenters argued, among other points, that when self-help is futile, an owner should be granted an injunction to stop a repetitive trespass, even if there is no physical harm to the chattel.⁷¹ By allowing some "public" access to its e-mail system, Intel did not forfeit the right to exclude whomever it wished from accessing its property.⁷² A homeowner who connects her private driveway to a public street does not give up the right to keep others from parking in the driveway.⁷³

62. 71 P.3d 296 (Cal. 2003).

63. *Id.* at 308-11.

64. *Id.* at 300-01.

65. *Id.* at 302.

66. *Id.* at 302-12.

67. *Id.* at 303.

68. *Id.* at 312.

69. *Id.* at 311.

70. *Id.* at 314, 325 (Brown, J., dissenting).

71. *Id.* at 313-25 (Brown, J., dissenting); *id.* at 325-32 (Mosk, J., dissenting).

72. *Id.* at 313-25 (Brown, J., dissenting); *id.* at 325-32 (Mosk, J., dissenting).

73. *Id.* at 313-25 (Brown, J., dissenting); *id.* at 325-32 (Mosk, J., dissenting).

Because of its lengthy discussion of trespass-to-chattels, *Intel* will be important for future cybertrespass cases.⁷⁴ The decision might appear to mark a reversal of the trend toward enforcement of private property rights in cyberspace. It may embolden screen-scrapers, at least in California,⁷⁵ to establish business models that do not include the consent of the target website.

However, the fundamental character of screen-scraping disputes is that they are purely commercial. The prospect of substantial commercial harm to the screen-scraping target cannot be discounted in understanding what courts consider important in enjoining trespasses. Perhaps the co-founder of Bidder's Edge put it best, saying, "It is one thing for customers to use a tool to check a site and quite another for a single commercial enterprise to do so on a repeated basis and then to distribute

74. In addition to trespass-to-chattels, website owners have many possible causes of action against screen-scrapers, and courts have enjoined scrapers under a variety of theories. For example, website owners typically provide access to their property subject to certain terms and conditions stated in a user agreement. Thus, when use of the site constitutes agreement to the terms, website owners have a valid breach of contract claim. For example, the court in *American Airlines, Inc. v. FareChase, Inc.*, No. 067-194022-02 (67th Dist. Ct., Tarrant County, Texas, Mar. 8, 2003) based its injunction in part on FareChase's violation of the AA.com User Agreement's prohibition of access for commercial purposes or access by a robot, spider, or other automated device. *Id.* at 4. Moreover, assent is usually not problematic in these cases because screen-scrapers have actual knowledge of the terms of the user agreement, and their violation of such agreements is intentional. In fact, at the time of the *American Airlines* litigation, FareChase's own website contained terms and conditions (1) providing that use of the site constituted assent to the terms; (2) limiting use of the site to "personal use;" and, remarkably, (3) prohibiting access of its site using any "robot, spider, or other automated device." FareChase.com User Agreement and Terms & Conditions, at <http://www.farechase.com/farechase/website/terms.jsp> (on file with Mercer Law Review).

Other possible causes of action include, but are not limited to, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000); state computer crime statutes, *see e.g.*, *American Airlines, Inc. v. FareChase, Inc.*, No. 067-194022-02 (67th Dist. Ct., Tarrant County, Texas, Mar. 8, 2003) (stating that FareChase may have violated section 33.02 of the Texas Penal Code); and misappropriation.

Furthermore, when the scraper essentially distributes the website owner's product without authorization, there are many varieties of harm that scrapers can inflict on a target company's image or reputation. For example, the scraper's representations to the public regarding itself and the target website owners' products could create false implications of a business relationship between the company and the scraper. In such situations, problems that customers may encounter with the scraping product may injure the goodwill of the target company.

75. Website owners whose property is located outside of California may avail themselves of potentially more favorable understandings of trespass in other states. *See, e.g.*, *Hawkins v. Hawkins*, 400 S.E.2d 472, 475 (N.C. Ct. App. 1991) (suggesting that actual damage is not an essential element of trespass to chattels).

that information for profit.⁷⁶ Companies such as eBay, Register.com, and American Airlines all invested millions of dollars in creating an online presence and using their websites to distribute products. And screen-scrapers, regardless of the nuances of each case, undermined those investments by using their targets' computers and computer capacity against their wishes for profit.

In *Intel*, in addition to the fact that the company produced little evidence of a threat to its computer system, Hamidi did not appear to compromise any core aspect of the company's business. To be sure, his messages were an annoyance⁷⁷—employees were forced to delete them, and their criticisms of the company caused a stir—but despite Hamidi's best efforts, his messages were unlikely to cause massive commercial harm.⁷⁸

The court in *Intel* did not believe that the company had suffered any sort of irreparable harm to support an injunction, regardless of whether there was harm to the chattel.⁷⁹ In contrast, the spammers in *Compu-Serve, Inc. v. Cyber Promotions, Inc.*⁸⁰ caused the company to lose customers.⁸¹ Additionally, in *eBay, Inc. v. Bidder's Edge, Inc.*,⁸² Bidder's Edge compromised eBay's license agreements with other auction aggregation sites.⁸³ The court in *eBay* even noted that the way eBay fashioned its request for relief was a "tactical effort" to strengthen its license negotiating position.⁸⁴ Similarly, in *Register.com, Inc. v. Verio*,

76. *eBay*, 100 F. Supp. 2d at 1062.

77. One court recently adopted an attitude of resignation regarding the daily annoyances of the Internet today: "Alas, we computer users must endure pop-up advertising along with her ugly brother unsolicited bulk email, 'spam', as a burden of using the Internet." *U-Haul Int'l, Inc. v. Whenu.com, Inc.*, 279 F. Supp. 2d 723, 725 (E.D. Va. 2003) ("Computer users, like this trial judge, may wonder what we have done to warrant the punishment of seizure of our computer screens by pop-up advertisements for secret web cameras, insurance, travel values, and fad diets.").

78. *Intel*, 71 P.3d at 304-05. The dissenters in *Intel* disagreed, finding that Hamidi's messages caused the following harms: (1) time spent deleting 200,000 email messages; (2) affront to its dignitary interest in ownership; (3) the use of Intel's property by another; (4) increased Internet access fees due to spam; (5) wasted employee time in sorting, reading, and discarding the messages; (6) decreases in the equipment's processing power causing slowness; (7) costs of efforts to block the messages; and (8) diminished employee productivity. *Id.* at 322-23 (Brown, J., dissenting).

79. *Id.* at 303 ("A fortiori, to issue an injunction without a showing of likely irreparable injury in an action for trespass to chattels, in which injury to the personal property or the possessor's interest in it is an element of the action, would make little legal sense.").

80. 962 F. Supp. 1015 (S.D. Ohio 1997).

81. *Id.* at 1023.

82. 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

83. *Id.* at 1067-68.

84. *Id.* at 1064 n.9.

Inc.,⁸⁵ Verio undermined the protections that Register.com had in place for its registrants against certain solicitations.⁸⁶ Likewise, in *Oyster Software, Inc. v. Forms Processing, Inc.*,⁸⁷ FPI diverted customers away from Oyster Software's website.⁸⁸ And in *American Airlines, Inc. v. FareChase, Inc.*,⁸⁹ FareChase undermined American's efforts to reduce the huge booking fees it paid each year.⁹⁰

Furthermore, part of the commercial harm of screen-scraping is free-ridership. In *Thrifty-Tel Inc. v. Bezenek*,⁹¹ *eBay*, *Register.com*, and *American Airlines*, but not in *Intel*,⁹² the trespassers were essentially doing something for free that non-trespassers had to pay for. The teens in *Thrifty-tel* were trying to access long distance codes without paying.⁹³ In *eBay* it appears that eBay had license agreements with other auction sites allowing them to monitor eBay's auctions, but Bidder's Edge was doing the same thing for free.⁹⁴ Register.com sold its new registrant listings to some companies for \$10,000 per month, but Verio was using Register.com's own system to do it for free, and in a way that hurt Register.com's business.⁹⁵ Moreover, in *American Airlines*, the airline had embarked upon a substantial program to allow traditional travel agents to offer its webfares as part of a deal in which the travel agents would pay some of American Airlines's booking fees. FareChase then tried to distribute webfares to travel agents for its own profit and without reducing American Airlines's overall booking-fee bill.⁹⁶

Not surprisingly, in balancing the competing interests in these commercial cases, courts have focused more on the protection of property rights than on the generalized goal of furthering the free flow of information.⁹⁷ After all, courts are accustomed to enforcing property

85. 126 F. Supp. 2d 238 (S.D. N.Y. 2000).

86. *Id.* at 251-52.

87. No. C-00-0724JCS, 2001 WL 1736382 (N.D. Cal. 2001).

88. *Id.* at *1-2.

89. No. 87-194022-02 (67th Dist. Ct., Tarrant County, Texas, Mar. 8, 2003) (order granting temporary injunction), available at http://www.eff.org/Cases/AA_v_FareChase/20030310_prelim_inj.pdf.

90. *Id.* at *3.

91. 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).

92. *But see Intel*, 71 P.3d at 324 (Brown, J., dissenting) (describing Hamidi as a "free-rider"). The free-rider label does not fit as neatly on Hamidi, an individual e-mailer.

93. 54 Cal. Rptr. 2d at 471.

94. 100 F. Supp. 2d at 1067-68.

95. 126 F. Supp. 2d at 242-43.

96. No. 067-194022-02, at *1-2 (67th Dist. Ct., Tarrant County, Texas, Mar. 8, 2003).

97. One commentator described the relevant balancing as that between "a business' interest in controlling access to its premises" and "the interest of all Internet users in low-cost, worldwide communication and unimpeded access to information." Warner, *supra* note

rights of individuals, whereas furthering broad public policy goals is a legislative function.⁹⁸ In *eBay*, for example, the court simply did not believe the Internet would “cease to function,” no matter how the court ruled.⁹⁹ The court was, of course, correct. Moreover, the court in *CompuServe* assessed that “the public interest is advanced by the Court’s protection of the common law rights of individuals and entities to their personal property.”¹⁰⁰

Intel involved none of this. Rather, *Intel* concerned a lone, former employee acting not for profit but for personal motives. Although he was using Intel’s private property to distribute his message, Hamidi was not seeking privileges for free that Intel sold to others.¹⁰¹ The majority found there was little chance that hordes of other noncommercial e-mailers would bombard Intel’s system.¹⁰² The majority specifically contrasted Hamidi with commercial spammers.¹⁰³ Therefore, absent in *Intel* was the sort of business dynamic that often justifies courts in enjoining scrapers.

Also, the court in *Intel* indicated that the company did not satisfy its self-help obligations.¹⁰⁴ Hamidi offered to remove any employee from his mailing list upon that employee’s request. Intel could have instructed all its employees to respond to Hamidi accordingly, and, if Hamidi is taken at his word, the problem would have subsided.¹⁰⁵ In screen-scraping cases, there tend to be few self-help options other than

61, at 119.

98. In discussing the public interest element of an injunction, one court recognized that it is “poorly suited” to make public policy and decide the appropriate balance between “encouraging the exchange of information and preserving economic incentives to create.” *eBay*, 100 F. Supp. 2d at 1072.

99. *Id.*

100. *CompuServe*, 962 F. Supp. at 1028.

101. *Intel*, 71 P.3d at 301-02.

102. *Id.* (noting that Intel did not show “any likelihood that Hamidi’s actions will be replicated by others if found not to constitute a trespass”). The success of so-called “gripe-sites” should be noted, however. See John Yaukey, *Gotta Gripe? Sites Let You Whine Online*, <http://www.usatoday.com/tech/columnist/ccyau022.htm> (last visited Nov. 12, 2003) (describing gripe-sites). Many gripe-sites are targeted at specific companies.

103. *Intel*, 71 P.3d at 306.

104. *Id.* at 312. Justice Mosk contended that the company had attempted all reasonable self-help. See, e.g., *id.* at 329 (Mosk, J., dissenting). Justice Mosk noted that

Intel attempted to put a stop to Hamidi’s intrusions by increasing its electronic screening measures and by requesting that he desist. Only when self-help proved futile, devolving into a potentially endless joust between attempted prevention and circumvention, did Intel request and obtain equitable relief in the form of an injunction to prevent further threatened injury.

Id. (Mosk, J., dissenting).

105. *Id.* at 301.

the usual ineffective blocking efforts. The law encourages property owners to take reasonable steps to protect their property from trespassers. Few courts would be eager to help a company that could easily help itself. But when an owner is helpless to stop a repetitive trespass, courts considering a request for an injunction may look to the maxim that "equity will not suffer a right without a remedy."¹⁰⁶

One dynamic *Intel* did involve, however, was that of an individual claiming to exercise his First Amendment right of free speech.¹⁰⁷ Hamidi's First Amendment argument against an injunction was far from a sure bet, but it is important in understanding the case. Hamidi claimed that he was trying to provide "an extremely important forum for employees within an international corporation to communicate via a web page on the internet and via electronic mail, on common labor issues, that, due to geographical and other limitations, would not otherwise be possible."¹⁰⁸

As a threshold matter, these First Amendment concerns would be inapplicable without state action. The court in *CompuServe* earlier held that an injunction against a spammer would not constitute state action for First Amendment purposes.¹⁰⁹ The majority in *Intel* chose not to rule on the state action question, but the majority was concerned about the speech issues Hamidi raised.¹¹⁰ The majority went out of its way to respond to the dissenters' arguments that there was no state action,¹¹¹ even though that part of the opinion is dicta.

The court of appeals in *Intel* stated, "Content discrimination is part of a private property-owner's bundle of rights."¹¹² But the supreme court majority repeatedly took exception to the fact that Intel objected to Hamidi's messages solely because of their content rather than their quantity.¹¹³ While this ostensibly concerns whether any threat to

106. See *id.* at 330 (Mosk., J., dissenting).

107. *Id.* at 301.

108. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 246-47 (Cal. Ct. App. 2001); see Lemley, *supra* note 22, at 542 (describing Hamidi's actions as "desirable social conduct").

109. *CompuServe*, 962 F. Supp. at 1025-26 (following *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 443-44 (E.D. Pa. 1996)).

110. *Intel*, 71 P.3d at 311-12.

111. *Id.*

112. *Intel*, 114 Cal. Rptr. 2d at 255.

113. *Intel*, 71 P.3d at 300-01 (distinguishing *CompuServe* and its progeny as based on the quantity, rather than content of the objectionable unsolicited e-mail); *id.* at 304 (noting that the "mere sending of electronic communications that assertedly cause injury only because of their contents [does not] constitute[] an actionable trespass to a computer system through which the messages are transmitted"); *id.* at 307 (observing that Intel's workers "were allegedly distracted from their work not because of the frequency or quantity of Hamidi's messages, but because of the assertions and opinions the messages conveyed).

Intel's computer system existed, the free-speech undertones of content discrimination are apparent. The dissenting opinion in the lower court claimed that an injunction against Hamidi would "transform[] a tort meant to protect possessory interests into one that merely attacks speech."¹¹⁴

Further evidence that the majority considered this a case about speech is its suggestion that the company pursue speech-related torts rather than trespass.¹¹⁵ Finally, one dissenter in *Intel* described the balancing of interests in the case as that between "expressive activity and property protection."¹¹⁶

The interests of screen-scrapers, in contrast, do not call to mind the same free-speech concerns. Far from the individual speaking out in the public square against some societal injustice, screen-scrapers are purely commercial actors out to make a profit by accessing others' personal property against their wishes. Moreover, such commercial speech is entitled to little protection.¹¹⁷ In screen-scraping cases, expressive activity is not in the balance the same way as it was in *Intel*.

V. CONCLUSION

Intel's noncommercial background, combined with its apparent free speech concerns and the company's possible self-help option, place the case in a different category from typical screen-scraping cases. Indeed, the court in *Intel* did not reject the trespass theory entirely, but essentially found Hamidi's trespasses to be de minimis violations.¹¹⁸ The "simple proposition that owners of computer systems, like owners of other private property, have a right to prevent others from using their property against their interests"¹¹⁹ will likely continue to prevail when trespassers pose substantial commercial harm to property owners. Thus, the trend of courts enjoining screen-scraping trespasses is likely to

Intel's complaint is thus about *the contents of the messages* rather than the functioning of the company's e-mail system"); *id.* at 308 (rejecting a property rule making senders liable for the contents of the communication).

114. *Intel*, 114 Cal. Rptr. 2d at 264 (Kolkey, J., dissenting).

115. See *Intel*, 71 P.3d at 300-01 (reasoning that "third party subjects of e-mail communications may under appropriate facts make claims for defamation, publication of private facts, or other speech-based torts"); see also *id.* at 330 (noting that the causes of action the majority suggests would require content analysis) (Mosk, J., dissenting).

116. *Id.* at 314 (Brown, J., dissenting).

117. The U.S. Supreme Court has stated that commercial speech holds a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

118. *Intel*, 71 P.3d at 303-08.

119. *Id.* at 329 (Mosk, J., dissenting).

continue after *Intel*. The decision in *Intel* is a poor vehicle for assessing the interests of website owners against screen-scrapers, and it should not be misperceived to justify a broad license for screen-scrapers to trespass and to use the property of others without consent.